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Attorneys for Plaintiff and Counter-Defendant CENTOCOR ORTHO BIOTECH, INC. and Third-Party Defendants GLOBAL PHARMACEUTICAL SUPPLY GROUP, LLC, CENTOCOR BIOLOGICS, LLC and JOM PHARMACEUTICAL SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CENTOCOR ORTHO BIOTECH,
INC.,

Plaintiff,

v.

GENENTECH, INC. and CITY OF
HOPE,

Defendants.

AND RELATED COUNTER AND
THIRD-PARTY ACTIONS.

Case No. CV 08-03573 MRP (JEMx)

**PLAINTIFF'S REPLY IN SUPPORT
OF *EX PARTE* APPLICATION FOR
LEAVE TO TAKE DEPOSITION OF
WITNESS JEFFREY KUSHAN
AFTER THE DISCOVERY CUT-
OFF DATE**

Date: TBA
Time: TBA
Place: Hon. Marianna R. Pfaelzer
Courtroom 12

1 Defendants opposition to Centocor's Application For Leave to Take Discovery
2 From Jeffery Kushan After The Discovery Cut-Off is premised on the unfounded
3 assumptions that: (1) every factual contention supporting a well-pled claim must be
4 alleged in a pleading; and (2) discovery from Jeffery Kushan is relevant only to
5 Centocor's inequitable conduct claims.

6 First, Centocor's inequitable conduct claim is indisputably in this case.
7 Defendants have not made either a motion on the pleadings or for summary judgment
8 that would remove the issue from this case. Centocor is, accordingly, and consistent
9 with the Federal Rules of Civil Procedure, entitled to take discovery that might lead
10 to new factual support and allegations concerning its inequitable conduct claim.
11 Centocor is not required to amend its pleadings every time it uncovers or seeks to
12 discover new facts supporting a claim or defense in this case. To require that would
13 be absurd.

14 The purpose of Rule 9(b) is not to thwart discovery on issues in the case, but to
15 prevent a party from engaging in a fishing expedition in an attempt to support a
16 "boilerplate allegation," as Genentech asserts in its opposition. That purpose is
17 entirely satisfied under the circumstances here. There has never been a challenge to
18 the sufficiency of Centocor's inequitable conduct pleading, so that issue is in the
19 case. And the deposition of one witness can hardly be considered a fishing
20 expedition, particularly when Centocor pointed out in an interrogatory response the
21 witness' relevance to at least Centocor's inequitable conduct claim.

22 Second, and a point that Defendants do not address at all, is the fact that Mr.
23 Kushan's deposition is also highly relevant to Centocor's invalidity defense. There is
24 no Rule 9 pleading requirement for this defense, and Defendants cannot credibly
25 deny Mr. Kushan's relevance to this topic. For example, the particular substance of
26 the conversation that Mr. Kushan had with the patent examiner that caused three
27 years of prosecution to do an about-face is absolutely relevant to the Cabilly II
28 patent's validity. Indeed, Mr. Kushan's deposition is particularly necessary on this

1 topic, as it was only recently that Defendants produced the only other witness that
2 might be able to testify about this subject matter and she said she that had no memory
3 of the particulars.

4 There is not even any feigned excuse for Defendants to refuse Mr. Kushan's
5 deposition on this basis. Both parties requested a number of depositions in the last
6 few weeks of discovery, for Defendants to suggest that Centocor was somehow late
7 in its request for this particular deposition is disingenuous.

8 Centocor's application for leave to take Mr. Kushan's deposition after the
9 discovery cut-off should, accordingly, be granted.

10
11 DATED: April 30, 2010

Respectfully submitted,

12 AKIN GUMP STRAUSS HAUER & FELD LLP

13 By: /s/ Dianne B. Elderkin
14 Dianne B. Elderkin

15 and

16 CONNOLLY BOVE LODGE & HUTZ LLP

17 By: /s/ Bruce G. Chapman
18 Bruce G. Chapman

19 Attorneys for Plaintiff and Counter-Defendant
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21 Defendants Global Pharmaceutical Supply
22 Group, LLC, Centocor Biologics, LLC and
23 JOM Pharmaceutical Services, Inc.
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